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February 22, 2019

Via E-Mail and Overnight Mail

U.S. Environmental Protection Agency
Office of Air Quality Planning and Standards
Air Quality Policy Division
Operating Permits Group Leader
109 T.W. Alexander Dr. (C-504-01)
Research Triangle Park, NC 27711

Re: Response of Otter Tail Power Company to Petition to Object to Proposed Renewal of Title V Operating Permit No. T5-F84011 for Coyote Station

Dear Sir or Madam:

Otter Tail Power Company respectfully submits the enclosed response to the January 15, 2019 petition of Casey and Julie Voigt requesting that the Administrator object to the North Dakota Department of Health's issuance of a proposed title V operating permit renewal for the Coyote Station power plant. The purpose of this response is primarily to highlight record materials that contradict and refute the arguments presented in the petition. Copies of this response have also been sent via email to the recipients listed below. If you have any questions about this response, please do not hesitate to contact me.

Sincerely,

/s/ Makram B. Jaber
Makram B. Jaber
Andrew D. Knudsen

Counsel for Otter Tail Power Company

CC (by email):
Monica Morales, Air Program Director, EPA Region 8, morales.monica@epa.gov
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Enclosure:
Response of Permit Applicant Otter Tail Power Company to Petition to Object to North Dakota Department of Health's Proposed Renewal of Title V Operating Permit for Coyote Station (16 pages)

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the matter of: Renewal of Title V Operating Permit No. T5-F84011 Proposed by the North Dakota Department of Health for Issuance to Montana-Dakota Utilities Co., North Western Public Service Company, Northern Municipal Power Agency (Minnkota Power Cooperative, Inc.), and Otter Tail Power Company for operation of the Coyote Station	Permit No. T5-F84011

RESPONSE OF PERMIT APPLICANT OTTER TAIL POWER COMPANY TO PETITION TO OBJECT TO NORTH DAKOTA DEPARTMENT OF HEALTH'S PROPOSED RENEWAL OF TITLE V OPERATING PERMIT FOR COYOTE STATION

Otter Tail Power Company ("Otter Tail") respectfully submits this response in opposition to the January 15, 2019 petition of Casey and Julie Voigt ("Petitioners") requesting that the Administrator object to the North Dakota Department of Health's ("NDDH") issuance of a proposed Title V operating permit renewal ("Permit") for Coyote Station. *In the Matter of Renewal of Title V Operating Permit No. T5-F84011*, Petition to Object to North Dakota Department of Health's Proposed Renewal of Title V Operating Permit for Coyote Station, Permit No. T5-F84011 (Jan. 15, 2019) ("Petition"). Otter Tail co-owns and operates Coyote Station.

Previously, the NDDH correctly determined that Coyote Station and the Mine are separate sources. However, Petitioners erroneously claim that Coyote Station and the Coyote Creek Mine ("Mine"), a lignite mine owned by Coyote Creek Mining Company, L.L.C. ("CCMC"), a subsidiary of The North American Coal Corporation, should be considered a single stationary source for Clean Air Act ("CAA") permitting purposes. Petitioners argue that the Administrator must object to the Permit's issuance because it is limited in scope to Coyote Station and does not contain applicable requirements for the Mine. In addition, they argue that construction of the Mine constituted a major modification of an existing source under the CAA's Prevention of Significant Deterioration ("PSD") program, and that the Permit is therefore also deficient because it does not contain Best Available Control Technology ("BACT") emission limits for Coyote Station or the Mine.

Petitioners are incorrect. Their argument misreads the relevant regulatory provisions, misstates the procedural and factual background, and ignores recent guidance from the U.S. Environmental Protection Agency ("EPA") governing these issues. The NDDH has now had three different opportunities to assess whether Coyote Station and the Mine should be considered a single stationary source—in a 2013 source determination, in CCMC's minor source permit

proceedings for the Mine, and in the proposed Permit at issue here—and each time it has correctly found that the sources are separate. EPA should not disturb those findings. Even if Petitioners are correct that Coyote Station and the Mine are adjacent, those two facilities are not under common control and are not part of the same major industrial grouping. Grouping these two sources together would defy the "common sense notion of a plant." Indeed, Otter Tail is unaware of *any* previous instance in which a mine-mouth power plant and its associated coal mine were found to be a single stationary source. Importantly, the sales agreement between the parties explicitly denies Otter Tail authority over the Mine's day-to-day operations.

Furthermore, assuming for the sake of argument that Coyote Station and the Mine are a single source, Petitioners' request for an objection based on the Permit's lack of BACT requirements associated with the Mine's construction is inappropriate. The Title V permitting process is not a proper venue to re-evaluate the validity of the underlying permits establishing applicable requirements for the source, including the applicability of PSD requirements. And in any event, construction of the Mine could not have subjected any existing emission units at Coyote Station to BACT because no changes were made to those units.

Accordingly, Otter Tail respectfully requests that the Administrator deny Petitioners' request to object to the Permit.

I. Background

Otter Tail Power Company co-owns and operates the Coyote Station power plant, a lignite coal-fired power plant in Mercer County, North Dakota. Until 2016, Coyote Station combusted lignite from the neighboring Dakota Westmoreland Corporation Beulah Mine. Currently, Coyote Station combusts lignite from the more recently constructed Coyote Creek Mine, pursuant to an October 10, 2012 Lignite Sales Agreement ("LSA") between CCMC and the owners of Coyote Station (collectively referred to herein as "Otter Tail"). *See* Pet. Ex. L (providing copy of LSA). CCMC mines lignite from its primary mining operations 3-4 miles from Coyote Station and transports it by truck along haul roads to a processing facility constructed by CCMC near the fenceline of Coyote Station.

CCMC first stores the mined lignite in a coal pile outside of the processing facility, where the lignite is processed (i.e., primarily crushed and sorted) and then delivered to Coyote Station across the fenceline via a conveyor belt. The conveyor belt has a three-fourths enclosure to control and minimize fugitive emissions and these measures have consistently resulted in zero percent opacity upon testing since construction.[1] The conveyor structure is owned by Coyote Station on its side of the fence, and by CCMC on CCMC's side of the fence. The belt itself is owned and maintained by Coyote Station. Title for the lignite transfers to Coyote Station at the fenceline. Coyote Station operates pursuant to permit number T5-F84011, a major source operating permit issued by NDDH pursuant to Title V of the CAA.

In February 2013, after the LSA had been executed but before construction of the Mine had begun, CCMC requested an express determination from NDDH that the Mine would be a

[1] Annual opacity performance tests of the conveyor belt have been submitted to NDDH and EPA in accordance with 40 CFR 60 Subpart Y.

separate stationary source from Coyote Station for CAA permitting purposes. Pet. Ex. C PG001-014, Letter from Donn Steffen to Terry O'Clair, "Coyote Creek Mining Company, L.L.C.'s Proposed Lignite Mine, Separate Stationary Source Determination Request" (Feb. 13, 2013) ("Source Determination Request").[2] At the time of that request, CCMC had not yet finalized site development and layout plans for the Mine, including the precise layout and location of the Mine's lignite processing and transfer facilities. Nonetheless, CCMC's 2013 letter correctly noted that:

> [t]he lignite will be hauled by truck, conveyor, or similar haulage system around the Dakota Westmoreland property that currently separates the [Mine] from the Coyote Station. The lignite will likely be conveyed by belt conveyor across the property/permit boundary between the [Mine] and the Coyote Station with transfer of ownership of the lignite occurring during the conveyance.

Id. at PG009-010.[3]

On April 11, 2013, NDDH determined that the Mine would be a separate stationary source from Coyote Station. *See* Pet. Ex. C PG015-018, Letter from Terry O'Clair to Donn Steffen (Apr. 11, 2013) ("2013 Determination"). NDDH observed that the Mine and Coyote Station "do not appear to be under common control and it is unclear if the two sources should be considered under the same SIC code," but because "the two sources are not located on contiguous or adjacent properties," they cannot constitute a single stationary source. *Id.* at PG018.

On September 9, 2014, CCMC submitted an application to NDDH for a minor source permit to construct the Mine. *See* Pet. Ex. C PG019-046. This application included additional detail as to the final plans for the Mine and its associated coal processing and transfer operations, including the locations of "a private haulroad directly connecting the mine pit area to [the] coal processing facility," "an eight acre open coal storage pile, a primary coal crusher, a secondary coal crusher, and a conveyor belt to directly convey crushed coal to Coyote Station." *See* Pet. Ex. B, Letter from J.J. England to NDDH, "Comments of Casey & Julie Voigt on Draft Permit T5-F84011 for Coyote Station" at 3 (July 21, 2018) ("Voigt Comments") (citing CCMC's application for construction permit for the Mine). On January 7, 2015, NDDH granted the Mine's minor source construction permit. *See* Pet. Ex. J. This more detailed and contemporaneously updated information on the Mine's layout and operations did not result in NDDH altering its determination that the Mine and Coyote Station are separate sources.

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[2] The Petition asserts that the Source Determination Request was "a joint request" by CCMC and Coyote Station. Pet. at 2. That is wrong. The Source Determination Request was submitted solely by CCMC on its own behalf. *See* Pet. Ex. C, Source Determination Request at PG001.

[3] Thus, contrary to Petitioners' suggestion that the Source Determination Request described "a facility that was very different than" the Mine's ultimate layout and operations, the Source Determination Request accurately apprised NDDH of the Mine's design and operating characteristics, including its relationship to Coyote Station.

On September 28, 2017, Otter Tail submitted an application for renewal of Coyote Station's Title V operating permit. NDDH issued a draft renewal permit on June 12, 2018. *See* Pet. Ex. A. Petitioners filed comments on the draft renewal permit on July 21, 2018, arguing that NDDH's 2013 Determination was incorrect, and that Coyote Station and the Mine should be considered a single stationary source. *See* Pet. Ex. B. As a result, they argued, the draft renewal permit was incomplete because it did not include applicable requirements for the Mine. Petitioners also claimed that construction of the Mine constituted a major modification at the single unified source that should have triggered PSD review. Otter Tail and CCMC each filed separate responses to Petitioners' comments with NDDH explaining why Coyote Station and the Mine do not constitute a single stationary source. *See* Pet. Ex. E, Letter from Miles B. Haberer to Terry O'Clair, P.E., Dir., Div. of Air Quality, NDDH, "Comments on Draft Permit TS-F84011 for Coyote Station" (Aug. 29, 2018) ("CCMC Comment Response"); Letter from Mark Thoma, Manager, Envtl. Servs., Otter Tail Power Co., to Mr. Terry O'Clair, P.E., Dir., Div. of Air Quality, NDDH, "Response to Comments of Casey and Julie Voigt on Draft Permit T5-F84011" ("Otter Tail Comment Response").[4]

On October 2, 2018, NDDH transmitted the Permit to EPA for review in accordance with CAA § 505(a)(1) and 40 C.F.R. § 70.8(a)(1). *See* Pet. Ex. E. NDDH rejected Petitioners' arguments and once again found that Coyote Station and the Mine are separate sources. In the letter transmitting the Permit, NDDH stated that pursuant to recent guidance clarifying EPA's interpretation of the relevant regulations:

> [I]t is apparent to the Department that the CCMC mine and the Coyote Station are not under 'common control' as the owners of the Coyote Station do not have authority to dictate decisions that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements for the CCMC mine. For example, the CCMC mine is subject to a fugitive dust control plan and it is the sole responsibility of CCMC to demonstrate compliance with the plan.

Id. at 2. Nevertheless, NDDH requested EPA's position on whether the Mine and Coyote Station should be considered under "common control."

EPA Region 8 responded to NDDH's "common control" inquiry by letter dated November 14, 2018. *See* Pet. Ex. F. In its response, Region 8 noted that because North Dakota's Title V and NSR programs have been approved by EPA, NDDH has primary responsibility to make the determination based on its EPA-approved rules. The Region did not take a position on whether the Mine and Coyote Station are a single source and acknowledged NDDH's "ultimate responsibility to make this determination based on the specific facts before it" applying the state's EPA-approved Title V and PSD rules. *Id.* at 2-3. However, the Region encouraged NDDH to evaluate the impact of a recently-issued guidance document clarifying that "the fact that two entities may each have some level of control over a particular *activity* (or a small portion of otherwise separate operations) does not mean that the *entities* themselves are 'persons under common control.'" *Id.* at 2 n.5 (citing Letter from Anna Marie Wood, Dir., Air

[4] The CCMC Comment Response and Otter Tail Comment Response are at pages 4-16 and 18-27 of Petitioners' Exhibit E, respectively. When citing to these documents, this Response will refer to the original internal pagination within those documents.

Quality Policy Div., Office of Air Quality Planning & Standards, EPA, to Ms. Gail Good, Dir., Bureau of Air Mgmt., Wis. Dep't of Natural Res. (Oct. 16, 2018) ("WDNR Letter")) (emphasis in original).

The Agency did not object to NDDH's proposed issuance of the Permit (and has not otherwise objected to the Permit within the 45-day review period under CAA § 505(b)(1) or 40 C.F.R. § 70.8(c)(1)). NDDH has not taken final action to issue the Permit. Petitioners filed this Petition for EPA to object to the Permit's issuance on January 15, 2019.

II. NDDH Correctly Determined Coyote Station and the Mine Are Separate Sources.

In a Title V permit objection petition, "the burden is on the petitioner to make the required demonstration to the EPA" that the proposed permit "is not in compliance with the requirements of the Act." *In the Matter of ExxonMobil Corp. Baytown Olefins Plant, Harris County, Texas*, Order on Pet. No. VI-2016-12 at 2 (Mar. 1, 2018) ("*Baytown*"); *see id.* at 3 ("The petitioners' demonstration burden is a critical component of CAA § 505(b)(2)."). To make such a demonstration, a petitioner generally must address "the state or local permitting authority's decision and reasoning" and provide the "relevant analyses and citations to support its claims." *Id.* at 3 (citing *MacClarence v. EPA*, 596 F.3d 1123, 1131-33 (9th Cir. 2010)). The petitioner must present more than mere "general assertions or allegations." *Id.* at 4 (citing *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Pet. No. VI-2011-05 at 9 (Jan. 15, 2013)). And the petition cannot "fail[] to address a key element of a particular issue." *Id.* (citing *In the Matter of EME Homer City Generation LP & First Energy Generation Corp.*, Order on Pet. Nos. III-2012-06, III-2012-07, & III-2013-02 at 48 (July 30, 2014)).

For the purposes of the CAA's Title V and PSD permitting programs, "pollutant-emitting activities" should be grouped together and treated as a single stationary source if they: (1) are located on one or more contiguous or adjacent properties; (2) are "under the control of the same person (or persons under common control)"; and (3) belong to the same major industrial grouping, indicated by a shared first-two-digit code in the Standard Industrial Classification Manual ("SIC code"). 40 C.F.R. §§ 52.21(b)(6) (defining "building, structure, facility, or installation" for PSD program) & 70.2 (defining "major source" for Title V program).[5] If any single criterion is not met, the facilities are not a single source. Permitting authorities conduct this analysis on a case-by-case basis and must be guided by the "common sense notion of [a] 'plant.'" 45 Fed. Reg. 52,676, 52,694-95 (Aug. 7, 1980) (citing *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)).

In its 2013 Determination, NDDH primarily relied on the "adjacent" criterion to conclude the Mine and Coyote Station are separate sources. *See* Pet. Ex. C, 2013 Determination at PG018. Petitioners claim that this conclusion was flawed given the final configuration of CCMC's coal processing facility. Pet. at 8. However, in and of itself, this does not resolve the matter.

[5] Because North Dakota operates its own EPA-approved Title V and PSD programs, the corresponding provisions that govern Coyote Station and the Mine are contained in the North Dakota Administrative Code at NDAC 33-15-14-06.1(q) and NDAC 33-15-15-01.2, respectively. The remainder of these comments will cite to the EPA regulations, which are substantially the same as the relevant state regulations.

Assuming for the sake of argument that Coyote Station and the Mine are "adjacent," Petitioners have failed to carry their burden of demonstrating that the facilities satisfy the "common control" and "major industrial grouping" criteria. Otter Tail and CCMC each explained why Petitioners' arguments fail in their letters to NDDH responding to Petitioners' comments. *See* Pet. Ex. E, Otter Tail Comment Response at 3-9, CCMC Comment Response at 3-9.

On the question of common control, Petitioners fail to address a key element of the issue by ignoring or misapplying EPA's most recent guidance on the common control criteria. They generally assert that Otter Tail exerts control over decisions at the Mine affecting compliance with emission requirements, but fail to cite any provisions of the LSA granting Otter Tail any such power. Indeed, there are none: Otter Tail does not exercise authority over the Mine's compliance with environmental obligations. To the contrary, the LSA clearly assigns responsibility for operating the Mine to CCMC and specifies that Otter Tail may not "control[] the methods and manner of the performance of the work" at the Mine. Pet. Ex. L, LSA ¶¶ 5.1.2(b), 12.3(a).

Likewise, on the question of the facilities' major industrial groupings, Petitioners apply the wrong analysis and ignore the unambiguous intent of Congress and EPA in promulgating this criterion. Congress identified sources such as these as the archetypal example of facilities that should *not* be consolidated into a single stationary source for permitting purposes. Further, Petitioners' analysis ignores evidence in the factual record in order to advance its weak argument.

A. Coyote Station and the Mine Are Not Controlled by Persons Under Common Control.

Coyote Station and the Mine do not share a common owner. Indeed, CCMC is a subsidiary of The North American Coal Corporation, which is in turn a wholly owned subsidiary of publicly-trade NACCO Industries, Inc. None of these entities is affiliated with any of the Coyote Station co-owners. Nevertheless, Petitioners argue the common control criterion is met because "[p]ursuant to the LSA, Coyote Station exerts complete control over Coyote Creek Mine." Pet. at 9. They also argue that Otter Tail "exerts actual physical operational control" over the Mine's coal processing facility. *Id.* at 11. These arguments fail for several reasons.

First, the Petition's arguments regarding Otter Tail's and CCMC's relationship under the LSA do not address EPA's most recent interpretation of the "common control" criterion, as set forth in the April 30, 2018 Meadowbrook Letter. *See* Letter from William L. Wehrum to Patrick McDonnell (Apr. 30, 2018) ("Meadowbrook Letter"); *see* Pet. Ex. E, Otter Tail Comment Response at 4-6.[6] While the Petition pays lip service to the Meadowbrook Letter, its actual analysis of the "common control" criterion is limited to EPA's previous "multi-factor" approach, which often turned on questions of economic or operational dependency between the sources. But EPA's current interpretation of the "common control" criterion focuses on whether one entity has the power to dictate the other's decisions *that affect the applicability of or compliance with relevant air pollution regulatory requirements.*

[6] Available at https://www.epa.gov/sites/production/files/2018-05/documents/meadowbrook_2018.pdf.

Otter Tail does not exercise any authority over the Mine's compliance with its environmental obligations—in fact, the LSA expressly denies Otter Tail any authority over the Mine's day-to-day operations. *See* Pet. Ex. E, Otter Tail Comment Response at 6. CCMC has its own employees, including environmental permitting personnel. Petitioners fail to cite any provision of the LSA giving Otter Tail control over such decisions. They also fail to dispute NDDH's finding that "it is the sole responsibility of CCMC to demonstrate compliance with" the Mine's fugitive dust control plan, which is the primary emission control obligation applicable to the Mine. *See* Pet. Ex. E at 2.

Moreover, even applying EPA's outdated "multi-factor" analysis (as the Petition does), nothing in the relationship between Coyote Station and the Mine rises to the level of influence or "but for" dependency that would constitute common control. *See* Pet. Ex. E, Otter Tail Comment Response at 6-7. Rather, whatever involvement Otter Tail has in reviewing and approving the Mine's mining plans and capital expenditures is a natural reflection of a cost-plus contract for providing lignite to Coyote Station.

Finally, Petitioners' arguments regarding operation of the coal processing facility completely ignore EPA's most recent guidance on this issue in the WDNR Letter. Otter Tail's ability to express the quantity of coal needed, communicate about operation of the facility for worker safety, and accept delivery of the requested coal do not constitute "control" over the Mine's processing facility. Moreover, the WDNR Letter makes clear that shared control over a specific emitting *activity* does not mean that Otter Tail and CCMC themselves are under "common control."

1. The LSA Does Not Establish Common Control as Defined in EPA's Meadowbrook Letter.

In its 2018 Meadowbrook Letter, EPA clarified its understanding of the term "common control" in order to "better reflect a 'common sense notion of a plant,' and to minimize the potential for entities to be held responsible for decisions of other entities over which they have no power or authority." Meadowbrook Letter at 6. Under EPA's interpretation, the assessment of "control" should focus on "the power or authority of one entity to dictate decisions of the other that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements." *Id.*

For the purposes of this analysis, "control" must be distinguished from the more general ability of one entity to *influence* another. "[T]he fact that an entity is influenced, affected, or somewhat constrained by contractual relationships that it negotiated at arm's length, or by external market forces, does not necessarily mean that one entity is actually controlled or governed by these influences in making a given decision." *Id.* at 7. To reflect "control," the entity must have authority to "expressly or effectively force another entity to take a specific course of action, which the other entity cannot avoid through its own independent decision-making." *Id.* "Control" is also not synonymous with dependency, which the Meadowbrook Letter states is relevant only for analyzing whether one entity is a "support facility" of another for the purposes of the "major industrial grouping" criterion. *Id.* at 10-11; *see infra* Section II.B (discussing support facility analysis).

Likewise, the "control" must extend to "whether a permitting requirement applies or does not apply to the other entity, or whether . . . the other entity complies or does not comply with an existing permitting requirement." Meadowbrook Letter at 8. Where "each entity has autonomy with respect to its own permitting obligations ... [i]t is more logical for such entities to be treated as separate sources." *Id.* Otherwise, a source's responsible official could be required to certify compliance with requirements when knowledge of that compliance is limited to the other entity, or a source could face liability for the actions of another entity that were outside the source's control. *Id.* at 9. EPA believes the most relevant considerations should include "the power to direct the construction or modification of equipment that will result in emissions of air pollution; the manner in which such emission units operate; the installation or operation of pollution control equipment; and monitoring, testing, recordkeeping, and reporting operations." *Id.* at 9-10.

Here, Otter Tail does not control the Mine's environmental obligations or compliance. *See* Pet. Ex. E, Otter Tail Comment Response at 4-6. The LSA provides for some degree of coordination between Otter Tail and CCMC with respect to the Life-of-Mine Plan and Annual Mining Plans. *See* Pet. Ex. L, LSA ¶¶ 5.2.1-5.2.3. But these review and approval provisions simply reflect Otter Tail's need for some oversight of the Mine's costs in light of the LSA's "cost plus" compensation structure. *See id.* ¶ 7.2 (explaining Otter Tail will compensate CCMC for the costs of production plus an agreed profit and capital charge). The provisions of these plans do not include any decisions with respect to permitting or environmental compliance: they are focused on capital expenditures and operating costs and expenses. At most, the required Annual Mining Plan provisions on "planned mine progression, location of infrastructure, and capital project locations," *see id.* ¶ 5.2.2(b)(i), might be construed as decisions on "the construction or modification of equipment that will result in emissions," *see* Meadowbrook Letter at 9. But the LSA does not provide for any review of how the Mine will meet its environmental obligations for those projects. Moreover, Otter Tail does not have authority over the manner in which Mine emission units operate; the operation of pollution controls (which, for mining activities, largely consists of dust suppression practices); or monitoring, testing, recordkeeping, or reporting. Therefore, the Petition is incorrect when it states that Otter Tail "has complete control over the mine through the LSA." Pet. at 11.

In fact, the LSA explicitly denies Otter Tail any authority to control CCMC's day-to-day operation of the Mine. *See* Pet. Ex. E, Otter Tail Comment Response at 6. The LSA specifies that only "*Seller* [i.e., CCMC] shall operate the Mine and perform all land, engineering, geological, operational, administrative and other work required to supply lignite" to Otter Tail. Pet. Ex. L, LSA ¶ 5.1.2(b) (emphasis added). While Otter Tail retains the right to access the Mine for periodic inspections, including inspection of "environmental and permitting materials," the LSA specifies that "[s]uch inspection shall not be for any purpose or reserved right of controlling the methods and manner of the performance of the work by" CCMC. *Id.* ¶ 12.3(a).

In overlooking the Meadowbrook Letter, the Petition "fail[s] to address a key element" of the "common control" inquiry. *See Baytown* at 4. While Petitioners cite the Meadowbrook Letter, *see* Pet. at 10-11, they assiduously avoid—through rhetorical sleight-of-hand—that Letter's basic premise, that the analysis turns on "whether a permitting requirement applies or does not apply to the other entity, or whether ... the other entity complies or does not comply with an existing permitting requirement." Meadowbrook Letter at 8. They simply focus on that

document's separate discussion of the *degree* of control required. *See* Pet. at 11 (arguing LSA "removes the autonomy" of CCMC and gives Otter Tail "authority to direct specific activities"). Petitioners fail to demonstrate that the authority they claim Otter Tail has through the LSA extends to the *type* of decisions specified in the Meadowbrook Letter—that is, decisions that "could affect the applicability of, or compliance with, relevant air pollution regulatory requirements." Meadowbrook Letter at 6.

Instead, Petitioners can only muster "general assertions or allegations" with no record support. *See Baytown* at 4. They claim that Otter Tail "must approve the mine's capital expenditures *and* operating plans," and that this "necessarily includes" decisions about "equipment that emits air pollution, air pollution control equipment, and operating plans that impact air quality." Pet. at 11 (emphasis in original). But tellingly, Petitioners cannot cite a single provision of the LSA giving Otter Tail authority over the Mine's operational decisions specifically related to environmental compliance. The LSA provisions Petitioners cite merely reflect Otter Tail has some oversight of CCMC's planned expenditures at the Mine (which is typical with a cost-plus contract under which the customer bears costs and an agreed-upon profit).[7] *Id.* at 9 (citing Pet. Ex. L, LSA ¶¶ 2.1(d), 5.2.2, 5.2.3). But as discussed above, even where Otter Tail's review includes capital expenditures on equipment or projects that may contribute to emissions, Otter Tail has no control over how CCMC will operate in order to comply with environmental obligations—and the LSA explicitly denies Otter Tail any control over the Mine's day-to-day operations.

Moreover, Petitioners have failed to address "the state or local permitting authority's decision and reasoning" for finding that Coyote Station and the Mine are separate stationary sources. *See Baytown* at 3. After reviewing Petitioners' comments on the draft Permit and analyzing the issues pursuant to the Meadowbrook Letter, NDDH concluded that "the owners of the Coyote Station do not have authority to dictate decisions that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements for the CCMC mine." Pet. Ex. E at 2. Specifically, NDDH pointed to the fact that one of the Mine's key emission control requirements is a "fugitive dust control plan," and that "it is the *sole responsibility* of CCMC to demonstrate compliance with the plan." *Id.* (emphasis added). This determination is particularly significant given that NDDH—as the regulatory authority that issued the Mine's minor source construction and operating permits and is responsible for enforcement of the requirements in those permits—is intimately familiar with what the Mine's fugitive dust control plan requires

[7] Petitioners argue that under the LSA, Otter Tail generally covers the costs of fees and penalties arising from environmental violations at the Mine, and that this arrangement is "indicative of a single source." Pet. at 10. This argument is barred because Petitioners did not raise it in public comments. 40 C.F.R. § 70.8(d). It was not impracticable for Petitioners to raise this issue: the cited portions of the LSA are publicly available, and Petitioners should have been apprised of them since at least 2013 when CCMC described them in its Source Determination Request. Pet. Ex. C, Source Determination Request at PG006. Moreover, Petitioners fail to demonstrate that such an arrangement is "highly unusual" as they claim or that it necessarily means Otter Tail has *control* over CCMC's compliance with the Mine's environmental obligations as the Meadowbrook Letter requires. In fact, this arrangement is merely a further reflection of the cost-plus nature of the contract between CCMC and Otter Tail.

and what decisions must be made to comply with it. Petitioners fail to acknowledge NDDH's rationale concerning this issue, let alone demonstrate why NDDH was wrong.

In short, CCMC is solely responsible for obtaining the permits for the Mine and for implementation of and compliance with pollution control requirements. Otter Tail exercises no control over these activities—quite the opposite, the LSA explicitly denies Otter Tail such control. Therefore, Coyote Station and the Mine are not under common control and do not constitute a single major source under the CAA.

2. Even Under Prior EPA Policy Guidance, the LSA Does Not Establish Common Control.

Instead of engaging in the analysis contemplated in the Meadowbrook Letter, Petitioners essentially resort to applying EPA's previous "multi-factor" analysis, citing the extent to which Otter Tail supposedly controls CCMC's (non-environmental) decisions about the Mine to assert that the sources must be under common control. While that approach is outdated and does not control EPA's analysis here, Otter Tail notes that even under EPA's prior policy, Coyote Station and the Mine would not be deemed to be controlled by owners under "common control." *See* Pet. Ex. E, Otter Tail Comment Response at 6-7.

Prior to the Meadowbrook Letter, EPA often evaluated common control using a "multi-factor" analysis to weigh a number of potential indicators of shared operational decisionmaking. These factors included, but were not limited to, "shared workforces, shared management, shared administrative functions, shared equipment, shared intermediates or byproducts, shared pollution control responsibilities, and support/dependency relationships." Meadowbrook Letter at 4. The "support/dependency" factor often came into play in cases where one facility could direct or influence the operations of the other, either through control over a critical aspect of operations or through economic leverage. EPA would assess the nature and degree of "influence that these economically or operationally interconnected entities exert (or have the ability to exert) on one another (*e.g.*, the ability to influence production levels)." *Id.* In the past, EPA often evaluated whether one facility would not be able to operate but for the existence of the other. *See* Letter from Judith M. Katz to Gary E. Graham, "Common Control for Maplewood Landfill, also known as Amelia Landfill, and Industrial Power Generating Corp." (May 1, 2002) (finding no common control, even where one facility was built on property owned by other, because, *inter alia*, either facility could continue to operate if the other were shut down).

At the outset, it is worth noting that North Dakota is home to other mine-mouth lignite-fired electric generating stations with business arrangements similar to those present here, and there is no indication that any other combination of mine and mine-mouth power plant has ever been deemed to be a single source. For example, before CCMC developed its mine, Coyote Station obtained its fuel from Dakota Westmoreland Corporation's Beulah Mine, which is even closer to Coyote Station than CCMC's mine. Thus, in numerous permitting decisions prior to the Meadowbrook Letter, including NDDH's 2013 Determination for these very sources,[8] the

[8] *See* Pet. Ex. C, 2013 Determination at PG017 (stating that dependency relationship between Mine and Coyote Station "does not appear to exist" under the provisions of the LSA).

NDDH determined (and EPA apparently did not disagree) that arrangements of this type do not constitute common control.

Moreover, in the particular circumstances presented here there is not a sufficient "support or dependency" relationship between the two entities to constitute common control under EPA's pre-Meadowbrook policy. Applying a "but for" test, Coyote Station does not depend on the Mine because it has already operated for decades prior to the Mine's construction. If the Mine were to close or was somehow unable to satisfy Coyote Station's requirements, Coyote Station could feasibly obtain lignite from other mines in the State. Likewise, the Mine is not entirely dependent on Coyote Station. Pursuant to the LSA, the Mine may sell lignite to Montana-Dakota's Heskett Station, and may sell to third parties so long as Coyote Station's requirements will still be met. Pet. Ex. L, LSA ¶¶ 14.2-14.3. In the absence of Coyote Station, CCMC could sell the Mine's lignite on the market in response to demand. *See* Pet. Ex. C, 2013 Determination at PG017. Finally, the facilities do not share any equipment (other than the conveyor belt), facilities, pollution control equipment, workforces, management, security forces, payroll activities, employee benefits, or insurance coverage. Pet. Ex. C, Source Determination Request at PG006. Although the Mine's coal processing facility transfers lignite from one site to the other, the equipment is not jointly owned: CCMC and Otter Tail have clearly established which entity owns the components necessary for that process.

3. Operation of the Coal Processing Facility Does Not Establish That Otter Tail and CCMC Are Under Common Control.

Finally, Petitioners' argument regarding operation of the coal processing facility lacks merit. The activities Petitioners describe do not constitute "control" of the coal processing facility. *See* Pet. Ex. E, Otter Tail Comment Response at 7. Moreover, Petitioners ignore recent EPA guidance in the WDNR Letter rejecting this type of activity as the basis for establishing "common control" of the sources' owners.

Petitioners' assertion that Otter Tail "exerts actual physical operational control" over the coal processing facility and, therefore, the Mine borders on the absurd. They assert that Otter Tail controls this facility because Coyote Station staff may call Mine staff to inform them of their coal needs for the day. Pet. at 11 (stating Mine staff "radios to Coyote Station at the start of every shift to determine the Station's coal needs and then he bases his coal crushing activities on what the Station radios back to him"). Staff at the two sources also inform one another before starting up or shutting down the conveyor belts or coal processing plant for worker safety. *Id.* Coyote Station controls the switch that allows it to take delivery of the coal it has requested at the fenceline, via conveyor belt.

Of course, what Petitioners describe is the outline of any basic arms-length business transaction: the customer places an order and the seller fills it. Petitioners' argument is akin to saying that a customer who places an order at a fast food drive-in speaker and then receives what she ordered at the window is in control of the restaurant. It goes without saying that a power plant must tell a mine when it needs coal (i.e., fuel to generate electricity at the power plant) and when it does not (e.g., due to either a scheduled or unscheduled outage at the power plant). Staff on either side of the fenceline must also be able to communicate about operations to ensure

worker safety. Furthermore, there is nothing unreasonable about a buyer controlling the device it uses to take delivery of the coal it has purchased when it needs that coal as fuel.

But even if Otter Tail could be said to have shared, or even total, control over the Mine's coal processing facility, it does not follow that *Otter Tail and CCMC* are under "common control" as is required for a single source determination. Petitioners' argument fails to account for EPA's recent guidance in the WDNR Letter, which explained how "common control" should be assessed in circumstances where two entities each exercise some level of control over a single, limited aspect of otherwise separate operations." *See* WDNR Letter at 4. Notably, Petitioners ignore the WDNR Letter despite the fact that EPA Region 8 staff explicitly flagged it as relevant to NDDH's common control analysis for these sources. *See* Pet. Ex. F at 2 n.5 (directing NDDH to WDNR Letter for "EPA's suggested approach" to the issue).

Petitioners are confusing the two different types of "control" referenced in the regulatory definition of a "stationary source." In the WDNR Letter, EPA clarified that "the word 'control' is used in two distinct ways: first, regarding whether a person 'controls' a given *activity*, and second, regarding whether multiple persons are *themselves* 'under common control.'" WDNR Letter at 5 (emphases in original). And while EPA may have "inadvertently blurred these distinct elements or suggested overbroad conclusions" in previous determinations, they are "two distinct aspects of the regulatory text" that must be given their own meanings. *Id.* at 5-6. Accordingly, "the fact that one entity has some control over an *activity* that another entity also has some control over does not necessarily mean that the first entity also controls the second *entity*, such that the two entities are 'under common control.'" *Id.* at 6. Instead, the permitting authority must independently make the letter determination on a case-by-case basis evaluating the facts of each particular situation. *Id.*

The WDNR Letter's guidance is directly applicable here. Petitioners argue that Otter Tail and CCMC are under "common control" because Otter Tail allegedly exercises control over portions of the Mine's coal processing facility. Pet. at 11. This is analogous to the example provided in the WDNR Letter, which described "two separately-owned manufacturing companies that operate independently with respect to all of their emissions-related activities, with the exception of a wastewater treatment plant over which they share control due to practical and economic convenience." WDNR Letter at 6. To the extent Otter Tail exerts control over the coal processing facility, it is solely for "practical and economic convenience," and control of that single facility does not affect operation of the Mine's other emissions-related activities. Here, as in the WDNR Letter, "it would stretch the plain meaning of 'persons under common control,' and the … 'common sense notion of a plant,' to consider these two entities to be [a] single source simply due to one piece of shared equipment."[9] *Id.*

[9] The WDNR Letter also explains why it would not be appropriate to group that facility (as opposed to the entire Mine) into Coyote Station as a single stationary source, even if Otter Tail and CCMC shared some control of the coal processing facility. EPA states that in situations involving shared control of emitting activities, the permitting authority should allocate the activity to a single source. WDNR Letter at 8. In deciding which entity should be responsible for the shared activity, the permitting authority should apply the Meadowbrook Letter framework and exercise its "reasonable discretion" based on the specific facts at hand. *Id.* As discussed

B. Coyote Station and the Mine Represent Different Major Industrial Groupings.

Using the two-digit classification code, the Mine falls under SIC major group 12 as a coal mine while Coyote Station falls under SIC major group 49 as an electric generating facility. Thus, the sources are not part of the same major industrial grouping. Petitioners nonetheless contend the Mine should be considered a "support facility" for Coyote Station and therefore should be grouped under the same SIC code. Pet. at 12-16. According to EPA, support facilities are "typically those which convey, store or otherwise assist in the production of the principal product" produced by the "primary activity" at a site. 45 Fed. Reg. at 52,695. For the reasons stated below, designating the Mine as a support facility for Coyote Station would conflict with the expressly stated intent of Congress and EPA and would be inconsistent with the facts. *See* Pet. Ex. E, Otter Tail Comment Response at 7-9; CCMC Comment Response at 6-9.

Congress and EPA have already indicated that a mine supplying coal to a nearby power plant should not be considered a support facility, *regardless* of how much of its output goes to that plant. The House Report on the 1990 CAA Amendments cited the same kind of facilities at issue here as its primary example of facilities that should *not* be aggregated as a single source. H.R. Rep. No. 101-490(I), at 236-37 (1990). That Report states that EPA's use of the SIC code criterion "avoids the possibility that dissimilar sources, *like a power plant and an adjacent coal mine*, will be considered as the same 'source' because of common ownership." *Id.* (emphasis added). Likewise, in promulgating its Title V regulations, EPA acknowledged the House Report and distinguished the coal mine/power plant example from other situations that might warrant aggregation by SIC code. 56 Fed. Reg. 21,712, 21,724 (May 10, 1991). Indeed, when EPA first promulgated the SIC code criterion as part of its definition of "stationary source," it did so specifically to avoid "group[ing] activities that ordinarily would be considered as separate," such as "a surface coal mine and coal-burning electrical generators that the mine supplies with coal" that are located "at one site and under common control." 45 Fed. Reg. at 52,694-95.

Despite these clear indications from Congress and EPA, Petitioners contend that the Mine must be a support facility for Coyote Station because its "sole purpose … is to provide coal for Coyote Station, and Coyote Station's sole source of coal is" the Mine. Pet. at 15. This is not true. Petitioners strain credulity by arguing that the North Dakota Public Service Commission made an explicit factual finding that "the purpose of the Coyote Creek Mine is to supply coal to Coyote Station" and by attributing weight to this finding in the determination whether the Mine and Coyote Station are in the same major industrial grouping. Pet. at 14. In fact, the Commission did not purport to define the Mine's "purpose" or exhaustively list its intended customers: it simply noted the only customer with a sales agreement at the time. As discussed above, while the LSA generally requires Coyote Station to obtain all its coal from the Mine, it does not preclude the Mine from selling coal to third parties. Pet. Ex. L, LSA ¶ 2.3. In fact, the LSA specifically affords CCMC the right to sell lignite from the Mine to Montana-Dakota's Heskett Station and to third parties. *Id.* ¶¶ 14.2-14.3. While it has not done so yet, the Mine is relatively new—having only commenced sales to Coyote Station in 2016. Thus, the Mine does

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above, only CCMC has control over the applicability of and compliance with environmental obligations at the Mine (including the coal processing facility).

not exist solely to "assist in the production of the principal product" at Coyote Station (i.e., generation of electricity).[10]

Petitioners rely heavily on a 1996 guidance document describing a "50 percent support" approach that purportedly establishes a presumptive test to determine whether one facility supports the other. Pet. at 12-15 (citing NDDH's 2013 Determination discussion of Memorandum from John S. Seitz to Regional Directors, "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act" (Aug. 2, 1996) ("Military Guidance")).[11] Under that test, a facility that contributes more than 50 percent of its output or services in support of another would be presumed to be a support facility. According to Petitioners, because the Mine supplies more than 50 percent of its coal to Coyote Station, it must be deemed a support facility.

But this 50 percent test is not required (or even suitable) for all support facility analyses, and it is not appropriate for use here.[12] *See* Pet. Ex. E, Otter Tail Comment Response at 8-9. The test Petitioners describe is best suited for determining how to categorize a support facility that serves two or more other facilities—it is not helpful in assessing *whether* a source should be considered a support facility in the first place. The 50 percent test is based on EPA's statement in promulgating the SIC code criterion that "[w]here a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which *relies most heavily* on its support." 45 Fed. Reg. at 52,695 (emphasis added). In its recent WDNR Letter, EPA indicated that this language is about assigning responsibility for a "shared support activity" that "supports multiple different primary activities." *See* WDNR Letter at 8 n.19. Likewise, the Military Guidance cited by NDDH in its 2013 Determination discussed the 50 percent output test in the context of "situations where an activity (e.g., an airport) supports two or more primary activities under same-entity control (e.g., missile testing/evaluation and pilot training)." Military Guidance at 16. Here, the Department is not evaluating several primary activities with which to aggregate the Mine as a support facility, but whether the Mine is a support facility at all.

The Military Guidance itself notes that the 50 percent approach "may not be the most appropriate test in certain situations. Support facility relationships should always be established in light of the particular circumstances of the sources being evaluated." Military Guidance at 17

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[10] For the first time, Petitioners also now argue that the Mine is a support facility because its coal processing facility "partially processes the coal for Coyote Station." Pet. at 15. As an initial matter, this argument is barred because Petitioners failed to raise it in their comments before NDDH. *See* 40 C.F.R. § 70.8(d). At most, it amounts to a time-barred argument that the *coal processing facility*—and not the entire Mine—is a support facility for Coyote Station, since the remainder of the Mine is engaged in different activities.

[11] Available at https://www.epa.gov/sites/production/files/2015-07/documents/dodguid.pdf.

[12] Notably, EPA at one time considered adopting the 50 percent output test as the formal regulatory threshold for support facility status, but ultimately rejected that approach. *Compare* 59 Fed. Reg. 44,460, 44,515, 44,526 (Aug. 29, 1994) (proposing addition of 50 percent test for support facilities in 40 C.F.R. § 70.2) & 60 Fed. Reg. 20,804, 20,807, 20,829 (Apr. 27, 1995) (proposing addition of 50 percent test in 40 C.F.R. § 71.2); *with* 40 C.F.R. §§ 70.2 & 71.2 (containing no definition or 50 percent threshold test for support facilities).

n.26. Further, the 50 percent threshold discussed in the Military Guidance establishes a mere *presumption* of support facility status, which may be rebutted by other evidence. As discussed above, that presumption is overcome here by other evidence that the Mine is not a support facility for Coyote Station.

III. The Title V Permitting Process Is Not the Proper Venue for Petitioners to Dispute PSD Applicability and the Validity of the Sources' Underlying Construction Permits.

Finally, Petitioners argue that because the Mine and Coyote Station are allegedly a single source, construction of the Mine "resulted in new emissions exceeding PSD significance thresholds" at that source. Pet. at 16. Therefore, "[Coyote] Station, including the CCMC mine, haul road, and coal processing plant, were therefore required to undergo PSD review, including a determination of best available control technology." *Id.* However, assuming for the sake of argument that Coyote Station and the Mine constitute a single source (and they do not, as discussed above), this Title V permit renewal proceeding would not be the proper forum for Petitioners to re-litigate questions of PSD applicability or seek imposition of BACT emission limits.

EPA has stated unequivocally that "the title V permitting process is not the appropriate forum to review [] preconstruction permitting decisions." *In the Matter of PacifiCorp Energy Hunter Power Plant, Emery County, Utah*, Order on Pet. No. VIII-2016-4 at 8 (Oct. 16, 2017) ("*PacifiCorp*"). Rather, EPA's position is that

> permitting agencies and the EPA need not reevaluate—in the context of title V permitting, oversight, or petition responses—previously issued final preconstruction permits, especially those that have already been subject to notice and comment and an opportunity for judicial review. Concerns with these final preconstruction permits should instead be handled under the authorities found in title I of the Act. Where a final preconstruction permit has been issued, whether it is a major or minor NSR permit, the terms and conditions of that permit should be incorporated as "applicable requirements" and the permitting authority and the EPA should limit its review to whether the title V permit has accurately incorporated those terms and conditions ....

Id. at 19. In other words, "preconstruction permit terms and conditions should be incorporated without further review." *Id.* at 13; *see also Baytown* at 5, 9-11; *In the Matter of Big River Steel, LLC, Osceola, Arkansas*, Order on Pet. No. VI-2013-10 at 8-20 (Oct. 31, 2017).

This EPA precedent directly precludes the relief Petitioners seek here. The Petition claims that Coyote Station and the Mine were required to undergo PSD review, including a determination of BACT for their emission units. Pet. at 16. But the Administrator held in *PacifiCorp* that "the issuance of a minor NSR permit defines the applicability of preconstruction requirements"; once a preconstruction permit has been duly issued to the source, its "applicable requirements" under the relevant state implementation plan have been defined. *PacifiCorp* at 10. For the purposes of Title V permitting, that is the end of the matter. Any challenges to the validity of that underlying preconstruction permit proceeding "should have been raised through

the appropriate title I avenues or through an enforcement action." *Baytown* at 10. Unless and until the underlying preconstruction permit requirements are "revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through one of these mechanisms," the permitting authority must simply incorporate their terms into the source's Title V permit. *PacifiCorp* at 16.

IV. Conclusion

For the foregoing reasons, Otter Tail respectfully requests that the Administrator deny Petitioners' request to object to the Permit.

Respectfully submitted,

/s/ Makram B. Jaber Date: February 22, 2019

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